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692-939—63

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 177

ROADWAY EXPRESS, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court dismissing an action brought by appellants to set aside orders of the Interstate Commerce Commission. Those orders, entered in separate proceedings instituted at different times by two groups of motor common carriers of general commodities, interpreted certain commodity restrictions in their existing certificates and denied their

alternative applications for extension of their operating rights.[1]

In both cases (*Western Express* and *Best Way*) the carriers sought extension of their operating rights to enable them to transport liquid and dry flowable commodities[2] in collapsible or stackable containers (termed "C&S" containers), a service ostensibly not authorized by their existing certificates. Such applications were coupled with requests or motions to dismiss on the ground that applicants' present certificates already contained the authority sought.[3]

The two proceedings grew out of confusion and conflicting views within the industry as to the degree of applicability to newly-developed collapsible and stackable containers of restrictions in the certificates of motor common carriers of general commodities against transportation of "commodities in bulk" and/

[1] In *Western Express Company Extension—Sealdtanks*, 84 M.C.C. 585 (J.S. 32a–80a), March 22, 1961, the entire Commission (two commissioners dissenting) decided a group of 14 application cases. In *Best Way of Indiana, Inc., Extension—Containers*, 86 M.C.C. 61 (J.S. 81a–118a), April 28, 1961, the entire Commission (two commissioners not participating) decided a group of 211 similar applications. The two commissioners who had dissented in *Western Express* concurred, on the ground that the latter case had decided the issue (J.A. 103a).

[2] Dry flowable materials are non-liquid substances which by reason of being in granular, powdered, or pellet form are capable of being poured into containers.

[3] This is the usual method of obtaining a Commission interpretation of existing operating authority. *Schenley Corp.* v. *United States*, 326 U.S. 432, 436.

or "commodities requiring special equipment".[4] The C&S containers here involved range in liquid capacity from 55 gallons to 4,400 gallons (Sealdrums, Sealdtanks, Nest-A-Bins) and in dry flowable capacity from 63 cubic feet to 300 cubic feet or 18,000 pounds (Sealdbin and Nest-A-Bin). They have the common characteristic of being collapsible to a relatively small size when empty (Sealdrums, Sealdbins, Sealdtanks, made of nylon tire cord), or stackable when empty (Nest-A-Bin, made of aluminum), enabling the carrier to utilize most of the space on the return haul for other lading. The largest container, the Sealdtank, is ordinarily mounted empty on the vehicle, tied down, and filled in place; the others are usually filled prior to loading.[5]

As the Commission noted in *Western Express*, the uses of these various C&S containers "tend to blur the heretofore relatively clear distinction between the field of service of the general freight carrier and that of the carrier of bulk commodities whether liquid or dry, and whether transported in tank, dump, or hopper type vehicles" (J.S. 53a). This distinction had previously been recognized in the authority granted to bulk carriers to haul "commodities in bulk" or "commodities requiring special equipment" and the exception of such authority in the certificates of general com-

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[4] The Commission discusses the history of these restrictions or exceptions, their meaning, and the dichotomy of motor common carriers based thereon in the *Western Express* opinion (J.S. 51a–53a).

[5] A detailed description of these various containers is contained in the *Western Express* opinion (J.S. 36a–38a); see, also, *Best Way* (J.S. 91a).

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modities carriers. Thus, the appellants' applications in both cases presented to the Commission the task of interpreting this terminology.

After an extensive discussion the Commission concluded in the *Western Express* case (J.S. 51a–59a), that the certificate restrictions should be construed in accordance with the historic difference between the "package" service offered by appellants and the "bulk" service offered by tank truckers, namely, that "the containers [are] package-like when *treated as packages* (i.e., tendered to and received from the carrier *when filled*)" (J.S. 10a–11a).[6] Under this

[6] This criterion was explained by the Commission as follows (J.S. 54a):

"On the specific question as to whether C&S container transportation belongs within one or the other basic field of service, we think it clear that by its nature such transportation falls exclusively within neither field and should not arbitrarily be so confined. In the past when general freight carriers have transported fungible, flowable commodities, those commodities have been contained or packaged by the shipper—in bags, drums, hogsheads, and the like—prior to tender of the shipment to the carrier. This is the type of transportation service discussed in the *Langdon* case, *supra* [27 M.C.C. 391] referred to by applicants. On the other hand, shippers of fungible, flowable commodities have been able to offer their traffic to tank truckers without the necessity of having to package it beforehand; it has been necessary for such a shipper merely to pump or pour the commodity directly into the vehicle in which it will be transported. See *Whitfield Transp., Inc.* v. *Solis*, 83 M.C.C. 25. This distinction between packaged and bulk service is basic and is clearly discernible in present and prospective uses of C&S containers. No justification has been shown for applying a different rule or for establishing arbitrarily, a new one for difference between the two types of service in connection with the movement of flowable commodities in C&S containers on ordinary equipment."

theory the right of the general-commodity carriers to carry goods in C&S containers depends upon whether the goods are placed in and removed from the container while the container is mounted upon the truck or trailer ~~(and removed therefrom)~~. On this basis the Commission ruled in *Western Express* (J.S. 59a):

> Summarizing, we conclude (1) that general-commodity carriers with restrictions against the transportation of commodities in bulk or those requiring special equipment *are* authorized to transport loose, flowable, and fungible commodities when tendered in dismounted C&S containers, whether supplied by the carrier or shipper, (2) that general-commodity carriers, as described in (1) above, *are not* authorized to transport such commodities when tendered into a premounted C&S container; and (3) that tank-truck carriers *are* authorized to transport such commodities when tendered into a premounted C&S container, whether supplied by the carrier or shipper.

These conclusions on the interpretation of the certificates were subsequently reaffirmed in *Best Way* (J.S. 84a–85a, 86a).

In both cases the Commission also held that appellants had not met their burden of proof on their applications for new authority (J.S. 14a). The Commission pointed out that its interpretation of existing certificates permitted extensive service in most of the C&S containers (J.S. 58a, 99a–101a). As to the remainder, it held that appellants had not shown that the bulk carriers were unable or unwilling to provide service in C&S containers, and it stated that "at the

least" they "should be afforded an opportunity" to expand their service to satisfy shipper needs before the appellants were granted further authority (J.S. 58a–59a, 101a–103a).

A divided three-judge district court, noting the limited scope of judicial review in this area (J.S. 8a–10a), held (J.S. 20a) that "the conclusions of the ICC as to interpretation and public convenience and necessity [and, 'National Transportation Policy'] have a rational basis and are consistent with the findings from the evidence submitted by the parties."

ARGUMENT

This appeal presents no substantial question warranting plenary review by this Court. The construction or interpretation of Commission operating certificates is primarily within the Commission's province, and the agency's interpretation is controlling on the courts unless clearly erroneous, arbitrary or capricious. *Nelson, Inc.* v. *United States,* 355 U.S. 554, 558. Similarly, the determination whether a certificate of public convenience and necessity should issue is a matter peculiarly for the Commission. *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 535–536; *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60, 65. Since, as the court below held, the Commission's conclusions "have a rational basis and are consistent with the findings" (J.S. 20a), the orders must stand.

1. Appellants' existing certif ates, the Commission recognized, were formulated to reflect the general-commodity carriers' actual service prior to regula-

tion, and the provisions against "bulk" carriage or use of "special equipment" were intended not only to restrict the carriers but also to protect them from having to accept commodities which they were not equipped to handle (J.S. 51a–53a). As the Commission further noted, these provisions are not readily applied to the novel collapsible and stackable containers involved in this case, since this form of transportation "tend[s] to blur" the heretofore relatively clear distinction between general and bulk carriage (J.S. 53a–54a).

The Commission's solution was to examine the traditional scope of general carriage for an applicable criterion. It found (J.S. 54a) that the "basic" differentiation between general-commodities carriers and the tank truckers has been that the former held themselves out to transport commodities when offered for transportation in prepackaged form by the shipper, while the latter held themselves out to accept commodities from the shipper in a loose, unpackaged state. It is this historic dichotomy that the "package-tank" criterion reflects, as the district court correctly stated (J.S. 11a–12a). Applying this criterion to C&S containers, the Commission found that when the container is first mounted on a vehicle and then filled, "the aggregate of facilities provided constitutes a property-carrying unit which is the practical equivalent of a tank or hopper type vehicle" (J.S. 56a). For this reason, this use of the new containers was held to be outside the general-commodity carriers' existing authority.

Contrary to the appellants' implications (J.S. 8, 9), this ruling gave them most of the authority which they sought. Appellants *are* authorized to transport any of the containers filled before loading on the vehicle and emptied after unloading therefrom (J.S. 59a), provided that the carrier utilizes ordinary trailer equipment and does not employ specialized loading equipment, such as cranes, winches, etc. (J.S. 55a). The record shows that all the C&S containers except the Sealdtank, the largest container, are normally used in the manner authorized by the Commission (J.S. 36a–38a, 91a). The Commission's construction of the existing certificates as permitting carriage of Sealdtanks only when so used rests upon its "legitimate inference" (J.S. 10a) as to the nature of the use (see *Radio Corporation of America* v. *United States,* 341 U.S. 412, 419–420) and its judgment, as the expert agency, of the indicia of general commodity carriage (*Nelson, Inc.* v. *United States,* 355 U.S. at 558; *American Trucking Assns.* v. *United States,* 344 U.S. 298, 310, 314).[7]

[7] Appellants contend that the Commission's criterion is unreasonable because it can result in a general-commodity carrier's service being lawful or unlawful on the basis of what the shipper does about loading or unloading the vehicle, specifically since this basis can and would convert an ordinary trailer to special equipment (J.S. 6). But the different consequences would flow from facts within the carrier's control, its holding out (accepted by the shipper) to accept commodities in a loose, flowable state into a tank mounted on the vehicle rather than in prepackaged form. To the extent that the Commission's view may be regarded as novel, it was "not estopped by its own precedents in the continuing regulation of a dynamic industry, in the reasonable exercise of its expertise under Congressional mandate. See *Virginian Railway Company* v. *United*

2. The Commission's denial of additional certificates of public convenience and necessity clearly relates only to the service not covered by the ruling on the interpretation question—*i.e.*, the use of the containers mounted on vehicles before filling, particularly the Sealdtanks, as above explained. The Commission correctly pointed out that the grant of such new competitive service under Section 207 must be supported by evidence establishing (1) that there is a public need for the new service, (2) that existing service is inadequate, and (3) that existing services would not be impaired contrary to the public interest (J.S. 101a–102a). The Commission was justified in concluding that the appellants had not made an adequate showing on these issues. There was scant evidence relating to specific routes and specific commodities; and no showing that the tank truck carriers would not be able to satisfy shipper needs, which they assert they are willing and able to do (J.S. 58a–59a, 102a–103a). As the Commission stated, the appellants were in effect seeking "*carte blanche* authorization * * * to invade the established field of service of bulk motor carriers whenever or wherever it is to their advantage" (J.S. 101a). The Commission properly denied their applications.

The present case, involving a technological advance in motor transportation, the potential ramifications of which have not yet been clearly explored, is one which lies particularly within the agency's expert judgment.

States, 272 U.S. 658, 663, 666." *ABC Freight Forwarding Corp.* v. *United States*, 169 F. Supp. 403, 405 (S.D.N.Y.). See, also, cases collected and discussed by the district court, fn. 28, J.S. 12a–13a.

The Commission concluded that its interpretation of the existing certificates should encourage appellants to provide extensive and valuable new C&S container service to the shipping public (J.S. 58a, 100a–101a). If this new service, together with that reserved to the tank truckers, should ultimately be inadequate to meet shipper needs, or result in artificially high transportation cost (as appellants allege it will), then, as the Commission and the court below recognized (J.S. 15a–16a, 102a–103a), appellants and shippers have adequate remedies under the Act. Indeed, subsequent to its decision in the instant cases, the Commission granted certain general-commodity carriers the authority to use Sealdtanks and other C&S containers premounted on trucks, when the carriers presented adequate evidence of the need for this service for carriage of specific commodities on specific routes. *Los Angeles-Seattle Motor Express, Inc.—Extension—Collapsible Containers,* 89 M.C.C. 621.

In these circumstances, the decisions in *Bestway* and *Western Express* represent a proper implementation of the National Transportation Policy. As the court found (J.S. 16a–20a), the Commission adequately disclosed the factors it weighed and gave due consideration to the objectives of achieving efficient and economical service, and sound and competitive economic conditions. Of course, the result reached

through balancing of these factors might result in some curtailment of the present use of C&S containers in order presently to protect tank carriers, and temporary loss of some possible economies of service in order to preserve sound economic conditions in the entire industry. But this "broad look" was essential to preserve competitive balance in the industry (J.S. 19a–20a), while at the same time adequately providing for the presently foreseeable "prospective" needs of shippers (J.S. 15a). The Commission's resolution of these difficult problems represents a carefully formulated "compromise between stability and flexibility of industry conditions, each alleged to be in the national interest." *American Trucking Assns.* v. *United States*, 344 U.S. 298, 313–314. The agency's decision is "the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts"; it is the type of judgment which Congress entrusted to the Commission's informed discretion. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 209.

CONCLUSION

For the foregoing reasons, we respectfully submit that the appeal presents no substantial issue warranting plenary consideration, and that the judgment of the district court should be affirmed.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
LIONEL KESTENBAUM,
COLIN A. SMITH,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
ROBERT S. BURK,
Attorney,
Interstate Commerce Commission.

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